

1989

Gene Brice, Willis Hall, Joseph R. May, Douglas Quayle, J. Rolfe Tuddenham, and Gordon Zilles, on behalf of themselves for the benefit of Cache Valley Dairy Association and for all members and/or Holders of Certificate of Interest in Cache Valley Dairy Association vs. Cache Valley Dairy Association, a Utah agricultural cooperative, Intermountain Milk Producers Association; a Utah Agricultural Cooperative; Vernon Bankhead; Randall Bradshaw, Don C. Nye; Frank P. Olsen; Wilford B. Meek; Lathair Peterson; Rulon King; Larry Pitcher; Lynn Mickel; Robert Haworth; Jeff Hyde; Evan Skinner; Robert Jackson; and William

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Lindley; Randon Wilson; John Does 1-30; Sam Soes 1-10: Brief of Appellants

Utah Court of Appeals

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 870259

GENE BRICE, WILLIS HALL, *
JOSEPH R. MAY, DOUGLAS *
QUAYLE, J. ROLFE TUDDENHAM, *
and GORDON ZILLES, on *
behalf of themselves, *
for the benefit of *
Cache Valley Dairy *
Association and for all *
members and/or Holders of *
Certificates of Interest in *
Cache Valley Dairy *
Association, *

Plaintiffs and Appellants, *

vs. *

CACHE VALLEY DAIRY *
ASSOCIATION, a Utah *
agricultural cooperative, *
INTERMOUNTAIN MILK PRODUCERS *
ASSOCIATION; a Utah *
Agricultural Cooperative; *
VERNON BANKHEAD; RANDALL *
BRADSHAW; DON C. NYE; FRANK P. *
OLSEN; WILFORD B. MEEK; *
LATHAIR PETERSON; RULON KING; *
LARRY PITCHER; LYNN MICKEL; *
ROBERT HAWORTH; JEFF HYDE; *
EVAN SKINNER; ROBERT JACKSON; *
and WILLIAM LINDLEY; *
RANDON WILSON; JOHN *
DOES 1-30; SAM SOES 1-10, *

Defendants and Respondents. *

Docket No. 870301

Priority No. 14b

BRIEF OF APPELLANTS

APPEAL FROM THE ORDER OF DISMISSAL OF THE
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF CACHE COUNTY
HONORABLE VENNY CHRISTOFFERSEN

MAR 20

Clerk, Supreme Court, Utah

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The parties to this litigation are as follows:

Appellants: Gene Brice, Willis Hall, Joseph R. May, Douglas Quayle, J. Rolfe Tuddenham and Gordon Zilles, on behalf of themselves, for the benefit of Cache Valley Dairy Association and for all members and/or Holders of Certificates of Interest in Cache Valley Dairy Association.

Respondents: Cache Valley Dairy Association, a Utah agricultural cooperative, Intermountain Milk Producers Association, a Utah agricultural cooperative, Vernon Bankhead, Randall Bradshaw, Don C. Nye, Frank P. Olsen, Wilford B. Meek, Lathair Peterson, Rulon King, Larry Pitcher, Lynn Mickel, Robert Haworth, Jeff Hyde, Evan Skinner, Robert Jackson and William Lindley, Randon Wilson, John Does 1-30 and Sam Soes 1-10.

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JURISDICTION OF THE COURT

The jurisdiction of the Court is timely invoked pursuant to Rule 3(a), Rules of the Utah Supreme Court, from the final order of District Judge VeNoy Christoffersen dismissing Plaintiffs' Complaint. T. R. at 586-588, Appendix Document K. The order was entered on July 23, 1987, based upon a memorandum decision rendered June 29, 1987. T. R. at 552-554, Appendix Document J.

NATURE OF PROCEEDINGS

This case concerns the procedures used in 1985-86 to combine two corporate agricultural cooperatives, Cache Valley Dairy Association (CVDA) and Intermountain Milk Producers' Association (IMPA).

The Plaintiffs are all directors, members and holders of certificates of interest in CVDA. They also sought certification as representatives of a class of all members and certificate holders. Plaintiffs also sought to act derivatively for CVDA. The Defendants are the two cooperatives, other directors of CVDA and legal counsel.

The issues were joined upon both parties' presentation of motions for partial summary judgment, Defendants' motion to dismiss and Plaintiffs' motion for class certification. Significant facts were undisputed. The court rendered a memorandum decision generally determining the legal issues in favor of the Defendants. Pursuant thereto, Plaintiffs' Complaint was ordered dismissed and class certification was denied. Plaintiffs appealed to this Court.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. The statutory procedures set forth in Sections 3-1-30 et seq. are legal prerequisites to any combination of Utah agricultural cooperatives.

II. Alternatively, if Section 3-1-30 et seq. is not mandatory, the Defendants were still obligated to follow those procedures by their use of a Notice and Summary and because the CVDA Board of Directors only approved a combination pursuant to

Section 3-1-30 et seq.

III. Alternatively, if Defendants are not required to follow Section 3-1-30 et seq., then Defendants were required to follow the statutory procedures for corporations desiring to merge, consolidate or transfer all assets not in the regular course of business.

IV. Alternatively, if Defendants are not required to follow the statutes governing combinations of agricultural cooperatives or even general corporate combinations, then Defendants were required to follow the common law.

V. A trial court cannot render a summary decision finding forms of relief to be "inequitable" when there are material, contested issues of fact set forth in affidavits before it relating to that form of relief.

VI. The trial court erred in failing to elucidate the legal and factual decisions it made by entering Findings of Fact and Conclusions of Law or at least specifying the basis for its ruling.

STATEMENT OF THE CASE

This is an action brought by six individuals, Gene Brice, Willis Hall, Joseph R. May, Douglas Quayle, J. Rolfe Tuddenham and Gordon Zilles, who are each a member and holder of certificates of interest as well as being an elected director of CVDA. The Plaintiffs also sought certification to act as class representatives of all members and holders of certificates of interest in CVDA. The Plaintiffs also sought to act derivatively

for CVDA. CVDA is a corporate agricultural cooperative pursuant to Title 3, U.C.A. 1953. Verified Complaint, T. R. at 1-26, Appendix Document I.

This action challenges the method and legal basis used to combine CVDA with Intermountain Milk Producers Association (IMPA), another corporate agricultural cooperative. Named as Defendants in the action were CVDA, IMPA, other directors of CVDA and legal counsel along with various John Does. Id.

The Complaint alleged that the combination of CVDA and IMPA was required to follow the statutory procedures set forth in Section 3-1-30 et seq. Further, that the statutory requirements were mandatory not permissive or alternative to other procedures. Id. Further that Defendants wholly failed to follow the statutory procedures requisite to a valid combination. Id.

Defendants admitted that the statutory procedures of Section 3-1-30 et seq. were not followed. T. R. at 197-198. Defendants urged, however, that the combination of the two cooperatives was by consolidation or transfer of all assets, therefore the procedures of Section 3-1-30 were not required. T. R. at 199-200.

Plaintiffs countered that the Notice sent to all members specifically stated that the combination was to be pursuant to Section 3-1-30 et seq.:

The Board of Directors of Cache Valley Dairy Association has adopted a Resolution directing that a Plan of Merger (Consolidation) under Section 3-1-30 et. seq., Utah Code Annotated, be submitted to a vote of the members of Cache Valley Dairy

Association at a special meeting of members to be held at 10:30 o'clock a.m. on Monday, December 16, 1985, at the Smithfield Armory, 10 East Center Street, Smithfield, Utah.

T. R. at 26, Appendix Document A.

The Board of Directors of CVDA never approved any other form or type of combination. Indeed there were no Board meetings from December 16, 1985, to December of 1986, nor did the board ever approve any other form of combination. T. R. at 380.

Alternatively, the Plaintiffs argued that if Section 3-1-30 et seq. is not mandatory, that the CVDA/IMPA combination would have to follow corporation procedures for merger, consolidation or transfer of all assets.

The Plaintiffs stated their claims individually, derivatively and as a class alleging that there was no valid transfer of assets to IMPA. The acts of the Defendants were also alleged to be negligent and cause for rescission of liens of encumbrances on CVDA property. Verified Complaint, T. R. at 1-26, Appendix Document I.

The Defendants filed a motion to dismiss alleging inconsistent causes of action because the complaint requested both direct and derivative relief in addition to money damages and rescission. T. R. at 91. Plaintiffs responded to that motion. T. R. at 117. Apparently, the court's final order is not based upon this motion or the grounds stated therein.

The Plaintiffs filed a motion for partial summary judgment on the central issue alleging that Defendants were required to follow the statutory procedures set out in Section 3-1-30 et seq.

T. R. at 48. Alternatively, the Plaintiffs urged that the Defendants were estopped from using any other procedure because of the language of the Notice sent. Id. Alternatively, Defendants had to follow either the corporate procedures for merger, consolidation or transfer of all assets or the common law. Id.

The Defendants responded to Plaintiffs' motion with a cross motion for summary judgment alleging there is no statutory procedure required other than board approval. T. R. at 247.

The court entered a memorandum decision addressing all the motions collectively. T. R. at 552. The decision held a class action inappropriate because "equity holders, producers, directors may have different interests". Id. The decision found Defendants had failed to follow the statutory procedures for merger of agricultural cooperatives. Further, that the Notice was defective if a merger or consolidation of agricultural cooperatives was contemplated. However, the court found that the statutory procedures were not an exclusive alternative for combination of agricultural cooperatives. Id.

The decision went on to hold that "there can be no recession (sic) as there are many other entities, people involved, that have so changed their position in reliance" that it would be inequitable. Id. The court found that Plaintiffs might have a claim for monetary damages for the transfer of assets but made no holding thereon. Id.

Plaintiffs requested the trial court to enter findings of

fact and conclusions of law so as to clarify the rulings. T. R. at 555. The court signed the order presented by Defendants' counsel without the clarifications requested. The order fails in significant part to even repeat the critical rulings of law rendered in the memorandum decision. Compare T. R. at 552 with T. R. at 586.

STATEMENT OF FACTS

There was no evidentiary hearing held in this matter so the facts must be gleaned from the verified complaint of the Plaintiffs and the facts proven by the affidavits of Plaintiffs and Defendants. The trial court failed to provide a record of what it determined material and undisputed, however, in significant part the facts are undisputed.

Plaintiffs' motion for partial summary judgment included a statement of relevant facts broken into twelve separate statements with specific reference to the verified complaint as support for the same. Defendants responded to that statement by admitting or clarifying each such statement. In the absence of a better record by the trial court, the combination of this interchange provides the Court with the undisputed facts. T. R. at 52-54, 197-199, Appendix Document L.

Plaintiffs' No. 1:

That Plaintiffs are directors, members, former members and/or equity holders of more than \$50.00 in CVDA. Verified Complaint at 3, 5 and 6.

Defendants' Response to No. 1:

Defendants agree that each plaintiff was at one time either a director, member, former member, or equity holder of more than \$50.00 in CVDA.

Plaintiffs' No. 2:

That CVDA and IMPA are both Utah Agricultural Cooperative Associations (corporations) organized and operated under Title 3, U.C.A. Verified Complaint at 1 and 7.

Defendants' Response to No. 2:

Defendants admit that CVDA and IMPA are Utah agricultural cooperative associations organized and operated under Title 3, Utah Code Annotated.

Plaintiffs' No. 3:

That the Board of Directors of CVDA did not approve at any time a plan of merger as required by Section 3-1-31. Verified Complaint at 25.

Defendants' Response to No. 3:

Defendants admit that the Board of Directors of CVDA did not approve at any time a plan of merger as contemplated by Utah Code Ann. Section 3-1-31. In fact, no attempt was made to consummate a merger per Sections 3-1-30 through 41 of Utah Code Annotated.

Plaintiffs' No. 4:

That the Notice attached hereto as Exhibit A is a true copy of the Notice used to advertise a meeting to consider the merger of CVDA into IMPA. Verified Complaint at 26.

NOTICE TO MEMBERS OF CACHE VALLEY DAIRY ASSOCIATION

The Board of Directors of Cache Valley Dairy Association has adopted a Resolution directing that a

Plan of Merger (Consolidation) under Section 3-1-30 et. seq., Utah Code Annotated, be submitted to a vote of the members of the Cache Valley Dairy Association at a special meeting of members to be held at 10:30 o'clock a.m. on Monday, December 16, 1985, at the Smithfield Armory, 10 East Center Street, Smithfield, Utah.

The principal purpose of the meeting is to consider and vote upon the Plan of Merger (Consolidation) of Cache Valley Dairy Association, Western General Dairies, Inc., Star Valley Producers, Inc., and Lake Mead Cooperative Association into Intermountain Milk Producers Association.

A summary of the Plan of Merger (Consolidation) is enclosed with this Notice. A full copy of the plan shall be furnished to any member upon request without charge. Requests should be made to Intermountain Milk Producers Association, 195 West 7200 South, Midvale, UT 84047.

Passage of this plan will require a simple majority of the members present at the meeting and voting thereon.

By order of the President as of this 25th day of November, 1985.

CACHE VALLEY DAIRY ASSOCIATION

By /s/ Wm. L. Lindley
President

SUMMARY OF PLAN OF MERGER (CONSOLIDATION)

1. Cache Valley Dairy Association, Western General Dairies, Inc., Lake Mead Cooperative Association and Star Valley Producers, Inc., ("Consolidating Cooperatives") propose to consolidate their assets into Intermountain Milk Producers Association, formed under Title 3, Utah Code Annotated, as an agricultural cooperative association ("IMPA").

2. The terms and conditions are: 1) the Consolidating Cooperatives will transfer to IMPA all of their assets at book value in exchange for the promise by IMPA to assume all liabilities of said cooperatives; b) All membership agreements held by said cooperatives shall be assigned to and assumed by IMPA in accordance with their terms; c) all milk base held by members shall become milk base of IMPA on a pound-for-pound

basis subject to the same rules, regulations and agreements in effect on the day the plan is adopted; d) all equities held by members of said cooperatives shall become equities of IMPA on a dollar-for-dollar basis subject to existing rules, regulations and agreements; f) all agreements, contracts, claims and obligations whatsoever, of said cooperatives shall be assumed by IMPA as though originally held by IMPA; g) All employees employed by said cooperatives as of the date of approval of the plan shall become employees of IMPA and all retirement plans, vacation accruals or other employee benefits shall be assumed by IMPA; and h) all other provisions of the Agreement of Merger (Consolidation).

3. The surviving corporation, IMPA, shall be governed by the Utah Uniform Agricultural Cooperative Association Act.

4. No changes will be required in the Articles of Incorporation of IMPA.

5. The eighteen (18) board members of IMPA shall establish districts which shall include all areas in which IMPA members reside and shall arrange for the election of directors from said districts at the fall 1986 district meetings for seating at the annual meeting of IMPA in January 1987.

6. The Presidents and Secretaries of the respective Consolidating Cooperatives shall execute such documents as are necessary to carry out the plan.

Defendants' Response to No. 4:

Defendants admit that the notice attached to plaintiffs' memo as Exhibit A is a true copy of the notice used to advertise a meeting to consider the transaction that had been under consideration since June of 1984. Defendants dispute plaintiffs' characterization that the meeting was to consider a "merger" of CVDA into IMPA.

Plaintiffs' No. 5:

That said notice states that the merger is to be completed in accordance with Section 3-1-30 et seq. Verified Complaint at 27.

Defendants' Response to No. 5:

Defendants dispute that the notice "states that the merger is to be contemplated in accordance with Section 3-1-30, et seq." The notice does refer to Section 3-1-30. However, a summary of the plan is attached to the notice, and paragraph 2 of the summary of the plan clearly sets forth the nature of the transaction, i.e., a transfer of assets, an assignment of liabilities, etc.

Plaintiffs' No. 6:

That in clear violation of Section 3-1-33, holders of certificates of interest (Equity Holders) in CVDA of \$50.00 or more were not provided with any notice whatsoever of a merger or of any meeting or specifically of the CVDA special meeting of members held on December 16, 1985, to consider the IMPA plan of merger. Verified Complaint at 28.

Defendants' Response to No. 6:

Defendants admit that equity holders were not given notice. Defendants dispute that there is any requirement to give equity holders notice of the contemplated transaction. Defendants dispute that equity holders had any right to vote.

Plaintiffs' No. 7:

That at the said special meeting Equity Holders of \$50.00 or more were not allowed to vote on the plan of merger. Verified Complaint at 29.

Defendants' Response to No. 7:

Defendants admit that at the meeting equity holders were not allowed to vote.

Plaintiffs' No. 8:

That at the said special meeting, no voting was allowed by delegate or proxy. Verified Complaint at 30.

Defendants' Response to No. 8:

Defendants admit that at the meeting no voting was allowed by delegate or proxy.

Plaintiffs' No. 9:

That Defendant CVDA and Defendant IMPA have refused to acknowledge dissenter's rights pursuant to Section 3-1-39. Verified Complaint at 32.

Defendants' Response to No. 9:

Defendants admit that there has been no award of dissenter's rights pursuant to Section 3-1-39. However, no one, including these plaintiffs, has asserted dissenter's rights pursuant to Section 3-1-39.

Plaintiffs No. 10:

There have been no Articles of Merger approved or even presented to the Board of Directors of CVDA nor have they been filed with the Secretary of State nor has a Certificate of Merger been obtained. Verified Complaint at 34.

Defendants' Response to No. 10:

Defendants admit that there have been no articles of merger approved or presented to the Board of Directors of CVD, nor filed with the Secretary of State, nor has the Certificate of Merger been obtained.

Plaintiffs' No. 11:

That all the assets and goodwill of CVDA have been purportedly assigned to IMPA. Verified Complaint at 36.

Defendants' Response to No. 11:

Defendants admit that all the assets and goodwill of CVDA have been assigned to IMPA.

Plaintiffs' No. 12:

That IMPA has appropriated CVDA's plants, personnel and labels to its own use. IMPA has treated this property in every way as its own since in or about December 1985. Verified Complaint at 37.

Defendants' Response to No. 12:

Defendants admit that all the assets and goodwill of CVDA have been assigned to IMPA, and that IMPA has treated this property in every way as property that has been assigned to IMPA. Defendants do not agree with plaintiffs argumentative characterization that IMPA has "appropriated CVDA's assets".

Subsequently, Defendant tendered a document they labeled as being "Defendants' Statement of Undisputed Facts" numbering the same in Paragraphs 1 through 39. T. R. at 140-151. Plaintiffs responded admitting, denying and/or clarifying the same with Plaintiffs' Affidavits. This provided some additional facts on which the trial court could base its decision. T. R. at 227-238. The Defendants' Statement and Plaintiffs' Response with the interchange as to each fact is included in its entirety in the Appendix as Document L.

The Plaintiffs submitted memoranda in support of their motions for partial summary judgment and class certification. T.

R. at 48, 104. The Defendants moved to dismiss Plaintiffs' complaint and alternatively for summary judgment. T. R. at 91, 177, 224. Each side opposed the other's motions. A hearing was held and the various motions were argued.

Subsequently, on June 29, 1987, the trial court rendered a memorandum decision. T. R. at 552. The Defendants tendered a proposed order to the court to which Plaintiffs duly objected. T. R. at 555. The basis of the objection was the failure to provide findings of fact and conclusions of law or clarification regarding the general findings, legal conclusions, denial of class certification and whether the decision was based upon the Defendants' motion to dismiss or for summary judgment. Id. Over Plaintiffs' objections the court entered the order as presented. T. R. at 586.

It is from this Order that the Plaintiffs appeal.

SUMMARY OF ARGUMENT

I. The statutory procedures set forth in Sections 3-1-30 et seq. are legal prerequisites to any combination of Utah agricultural cooperatives.

The legislative enactment, Section 3-1-30 et seq., is exclusive and mandatory setting all authority given agricultural cooperatives to combine whether that be by merger, consolidation or transfer of assets.

II. Alternatively, if Section 3-1-30 et seq. is not mandatory, the Defendants were still obligated to follow those procedures by their use of a Notice and Summary and because the

CVDA Board of Directors only approved a combination pursuant to Section 3-1-30 et seq.

The factual circumstances herein estop the Defendants from anything other than a Section 3-1-30 combination. The CVDA Board never approved any other type of combination.

III. Alternatively, if Defendants are not required to follow Section 3-1-30 et seq., then Defendants were required to follow the statutory procedures for corporations desiring to merge, consolidate or transfer all assets not in the regular course of business.

If Section 3-1-30 et seq. is not the exclusive procedure, then Defendants would be required to follow the similar statutory procedures for business or non-profit corporations. The Defendants cannot make new law. The Defendants did not follow those procedures either.

IV. Alternatively, if Defendants are not required to follow the statutes governing combinations of agricultural cooperatives or even general corporate combinations, then Defendants were required to follow the common law.

The common law in the absence of statutory modification requires unanimous consent from stockholders for merger, consolidation or transfer of all assets. No such consent was obtained by Defendants.

V. A trial court cannot render a summary decision finding forms of relief to be "inequitable" when there are material, contested issues of fact set forth in affidavits before it

relating to that form or relief.

The trial record indicates significant factual disputes relative to the "equity" of various remedies. The court's summary decision was in the face of disputed facts and premature.

VI. The trial court erred in failing to elucidate the legal and factual decisions it made by entering findings of fact and conclusions of law or at least specifying the basis for its ruling.

There is no adequate basis for the trial court rulings particularly with respect to Plaintiffs' motion for class certification.

ARGUMENT

- I. THE STATUTORY PROCEDURES SET FORTH IN SECTION 3-1-30 ET SEQ. ARE LEGAL PREREQUISITES TO ANY COMBINATION OF UTAH AGRICULTURAL COOPERATIVES.

CVDA and IMPA are both specialized corporations known as agricultural cooperative associations pursuant to Section 3-1-1, et seq. U.C.A. 1953. Sections 1-29 of Title 3 were adopted in 1937. In a 1965 Act, Sections 30-41 were added to the original sections with an avowed purpose:

[T]o permit merger of agricultural co-operative associations with other corporations, domestic or foreign; establishing the procedure for said mergers and the rights and privileges, duties and obligations of the corporations surviving said merger and of the members and shareholders of each party to the merger.

Title of Act. See Section 3-1-30, U.C.A. [Emphasis added.]

This law provides a specific set of procedures and guidelines:

1. The Board of Directors must approve by resolution a

"plan of merger".

2. Notice of a meeting of members to approve the plan must be given to every member of record or equity holder (of \$50.00 or more).

3. Equity holders (of \$50.00 value or more) are entitled to vote irrespective of whether they are members as defined by the corporate Articles of Incorporation or Bylaws.

4. Voting at the meeting shall be in person, by proxy or by delegate.

5. Upon approval by a majority vote at the meeting, articles of merger shall be executed and filed with the Secretary of State.

The general and accepted rule is that corporations, as creatures of statute, can only merge or consolidate in accordance with legislative enactment.

Corporations have the right and the power to consolidate or merge only by the consent and authority of the legislature. The consent of the state to a valid consolidation or merger must be clearly and distinctly expressed; it is never implied, and exists only by virtue of plain legislative enactment.

The power of the several states to authorize the consolidation or merger of corporations in the absence of special constitutional restrictions is undoubted. Statutory provisions authorizing merger of corporations have been held not unconstitutional

19 Am.Jur.2d Section 2608 at 419 [citations omitted].

The constitutional power of a state to restrict the consolidation or merger of corporations is indisputable. . . . since legislative sanction is essential to the right of corporations to consolidate or merge, the legislature may attach to the grant such

conditions, and impose such terms, as it chooses.

Id. at Section 2611 at 442. [citations omitted].

The Utah legislature adopted the specific procedural provisions for combination of agricultural cooperatives set forth in Sections 3-1-30 et seq. These provisions provide the necessary legislative authority to allow cooperative associations to combine. The Defendants urge that these statutory procedures can simply be circumvented by terming the combination a "consolidation" or by doing a "transfer of assets".

The clear intent of Section 3-1-30 et seq. is to provide an exclusive procedure for merger/consolidation/transfer of assets of agricultural cooperatives. While the language uses the word "merger" the description of procedures encompasses the technical definitions of "consolidation" and "transfer of assets".

The authorities familiar with corporate and cooperative law broadly disagree with the right of the Defendants to disregard statutory prerequisites:

There are statutes in most states providing for the merger or consolidation of corporations, including cooperative corporations. Whenever it is proposed to merge or consolidate cooperatives, these statutes must be followed strictly . . .

Statutory provisions for merger or consolidation in existence at the time a person becomes a stockholder in a corporation become a part of his contract with the corporation.

Legal Phases of Farmer Cooperatives, United States Department of Agriculture (1976) at 111-112. [emphasis added].

Defendants are asking the court to make "new law". The trial court was asked to create this "new law" so as to authorize

what the Defendants had already done. T. R. at 78-83, Appendix Document H. It is common and accepted knowledge that corporations and cooperatives are creatures of statutory birth and origin calling upon legislative grant for the exercise of powers. Neither the trial court nor any other can make "new law" for corporations and cooperatives. It can interpret and define statutory grants, but it cannot create them.

The Plaintiffs' motion for partial summary judgment called for the simple application of well accepted doctrines of statutory interpretation. The legal maxim, expressio unius est exclusio alterius (the expression of one thing is the exclusion of another), has significant application here. The Utah State Legislature has set forth a detailed and protective procedure allowing the combination of agricultural cooperatives. The legislature, with the provision of one set of procedures, has excluded any alternatives.

II. ALTERNATIVELY, IF SECTION 3-1-30 ET SEQ. IS NOT MANDATORY, THE DEFENDANTS WERE STILL OBLIGATED TO FOLLOW THOSE PROCEDURES BY THEIR USE OF A NOTICE AND SUMMARY AND BECAUSE THE CVDA BOARD OF DIRECTORS ONLY APPROVED A COMBINATION PURSUANT TO SECTION 3-1-30 ET SEQ.

The producers, but not equity holders, of CVDA did receive a written Notice from their Board of Directors relative to their intent:

NOTICE TO MEMBERS OF CACHE VALLEY DAIRY ASSOCIATION

The Board of Directors of Cache Valley Dairy Association has adopted a Resolution directing that a Plan of Merger (Consolidation) under Section 3-1-30 et seq., Utah Code Annotated, be submitted to a vote of the members of Cache Valley Dairy Association at a

special meeting of members to be held at 10:30 o'clock a.m. on Monday, December 16, 1985, at the Smithfield Armory, 10 East Center Street, Smithfield, Utah.

The principal purpose of the meeting is to consider and vote upon the Plan of Merger (Consolidation) of Cache Valley Dairy Association . . .

Notice dated November 25, 1985, signed by William Lindley, President of CVDA. T. R. at 26, 63, 324, Appendix Document A. The Notice speaks for itself. Indeed, the accompanying Summary of Plan of Merger (Consolidation) tracks with the requirements of Section 3-1-31 and 3-1-32. T. R. at 64, 325, Appendix Document B. There were no meetings of the Board of Directors of CVDA from the date this Notice was authorized to the date all CVDA assets were purportedly transferred or assigned to IMPA.

The Board's own Notice binds CVDA to the procedures set forth at Section 3-1-30 et seq. Yet CVDA and IMPA wholly failed to follow the spirit and the substance of the statutes cited in the Notice.

1. There was no Resolution of the CVDA Board of Directors approving a Plan of Merger. See Section 3-1-31, U.C.A. 1953.
2. Equity Holders of more than \$50.00 were not given notice nor right to vote. See Section 3-1-33, Id.
3. Voting by representative or proxy was not allowed. See Section 3-1-35, Id.
4. No Articles of Merger were approved or filed. See Section 3-1-36, Id.
5. No dissenter's rights were allowed. See Section 3-1-

40, Id. T. R. at 52-54, 197-199, Appendix Document L.

The Board of Directors of CVDA clearly approved the submission of the decision of whether to "merge the co-op" to the members. T. R. at 380, Appendix Document D. At that meeting the members present did vote their approval. Later, IMPA purported to abandon this Plan of Merger pursuant to "statute", a clear reference to the last paragraph of Section 3-1-35, U.C.A. 1953. See IMPA Minutes. T. R. at 326, Appendix Document E. Interestingly, it is IMPA not CVDA which purports to abandon this Plan.

The only combination of any form ever approved by the Board of CVDA was a statutory, Section 3-1-30 et seq., "merger". Albeit this was done with faulty compliance with required legal procedures. Then with further faulty procedures it was submitted to some of the members who approved. Later the IMPA Board purports to abandon the "merger" plan and proceed with a transfer of assets. The latter was never considered or approved by the CVDA Board. It was never even submitted to that Board nor to the CVDA members. The CVDA Board's approval must be found in its Board Minutes of November 27, 1985, for there were no further CVDA Board meetings until December 1986 when the controversy herein was argued.

There were simply no CVDA meetings wherein anything was abandoned, or wherein alternative forms of combination could be considered much less approved. The bulk of the CVDA Board members understood that a merger had occurred and that the two

organizations were going to be joined pursuant to Section 3-1-30 et seq. No notice whatsoever was given to them of a purported abandonment by IMPA. T. R. at 326, Appendix Document E. Nor was any notice given that there was to be a "transfer of assets" as an alternative to the merger.

The officers who signed documents to effectuate the "transfer of assets" believed they were effectuating the statutory merger approved. See Summary, T. R. at 64, Appendix Document B, which itself refers to transfers as a part of the statutory merger. These directors and officers as laymen were not aware of requisite procedures of Section 3-1-30 et seq. but relied upon legal counsel to the effect that the necessary steps were being implemented. The members were in a similar position, having received the Notice and Summary they would presume a Section 3-1-30 statutory merger was being completed. They have a right to believe that given the communications received.

The abandonment is essentially a secret, unpublished to anyone except the IMPA Board. When individuals attempted to assert legal rights under Section 3-1-30, i. e. dissenter's rights then they were met with the argument that there was no "merger" but a consolidation or transfer of assets. Thus the provisions of Section 3-1-30 et seq. have no application. See Letter of Randon Wilson dated November 19, 1986, T. R. at 65-77, Appendix Document F and Letter of Randon Wilson dated March 9, 1987, Appendix Document H. Attorney Wilson was counsel for IMPA and legal architect and drafter of the Notice, Summary, Letter of

Intent and IMPA Resolution of December 19, 1985, and of the subsequent documents of transfer signed in August of 1986. See T. R. at 78, Appendix Document G.

Legal counsel for IMPA has advanced the theory that a "transfer of assets" was approved by the CVDA Board before the consolidation with IMPA even commenced. See Letter of Randon Wilson dated November 19, 1986, Page 4, Subsection (4) and response. T. R. at 68, Appendix Document F. This can only be a reference to the Letter of Intent in which no such thing is approved. See Letter of Intent, T. R. at 328-333, Appendix Document C. The statement by Attorney Wilson is also an admission that there was no further approval considered or even sought from the CVDA Board after December of 1985. The last meeting of directors was actually on November 27, 1985.

The Defendants are bound to the procedures of Section 3-1-30 et seq. by their Notice and Summary and the CVDA Board approvals. Even were there alternative legal mechanisms which could be used to combine, the election was clearly made and never changed to proceed pursuant to Section 3-1-30 et seq.

III. ALTERNATIVELY, IF DEFENDANTS ARE NOT REQUIRED TO FOLLOW SECTION 3-1-30 ET SEQ., THEN DEFENDANTS WERE REQUIRED TO FOLLOW THE STATUTORY PROCEDURES FOR CORPORATIONS DESIRING TO MERGE, CONSOLIDATE OR TRANSFER ALL ASSETS NOT IN THE REGULAR COURSE OF BUSINESS.

Agricultural cooperative law is supplemented by general corporate statutory enactments. The statute providing for agricultural cooperatives includes this reference to general corporate enactments by granting to them

[t]he rights, powers and privileges granted by the laws of this state to corporations generally, excepting such as are inconsistent with the express provisions of this act.

Section 3-1-9, U.C.A. 1953. Lacking an express inconsistency in the agricultural cooperative section, supplementary reference can be to the legislative grants to corporations.

It is the Plaintiffs' position that the procedure set forth at Section 3-1-30, et seq. encompasses all legislative authority and hence all authority of agricultural cooperatives to combine; that there are "express provisions" governing combination. However, if that legal interpretation is wrong, an agricultural cooperative in order to combine would still be required to follow the Business Corporation Act procedures, 16-10-66, et seq., or alternatively the NonProfit Corporation Act procedures 16-6-54, et seq. This is the clear mandate of Section 3-1-9.

The Defendants will find no relief in these other corporate procedures for merger, consolidation or transfer of assets for they require in near identical fashion the steps incident to Section 3-1-30, et seq. The essentials being Board approval of a plan of merger or consolidation, notice to all stockholders and a subsequent vote thereon by all stockholders. Section 16-10-68, et seq. That statute specifically provides

[e]ach outstanding share of each such corporation shall be entitled to vote . . . whether or not such share has voting rights under the provisions of the Articles of Incorporation of such corporation.

Id. Upon majority vote approval, articles of merger or consolidation are to be filed with the Secretary of State.

Similar procedures govern the sale or assignment of all or substantially all of a corporation's assets. Again this procedure requires all stockholders be given notice and the right to vote. Section 16-10-75, et seq.

Dissenter's rights exist under all of these forms of consolidation. Each stockholder has a right to have his interest appraised and paid be it a merger, consolidation or transfer of assets.

There is no statutory basis for the Defendants' actions in combining CVDA into IMPA. Their admission of a failure to follow the statutory procedures of the agricultural cooperative statute compels them to admit a like failure to follow the similar statutory procedures of the NonProfit and Business Corporation Acts.

IV. ALTERNATIVELY, IF DEFENDANTS ARE NOT REQUIRED TO FOLLOW THE STATUTES GOVERNING COMBINATIONS OF AGRICULTURAL COOPERATIVES OR EVEN GENERAL CORPORATE COMBINATIONS, THEN DEFENDANTS WERE REQUIRED TO FOLLOW THE COMMON LAW.

In the event legislative authority was granted to corporations for merger, consolidation or transfer of all assets without a description of the necessary procedures, common law supplied those:

[C]ommon law required the unanimous consent of stockholders to carry out major corporate transactions, such as a merger or consolidation of the corporation, or a sale of all or substantially all of its assets. This rule permitted a minority of stockholders to block effectively the implementation of those decisions or policies which while conceivably beneficial to the corporation in some cases, and while so recognized by the majority stockholders, were not to the liking of the remaining few.

18A Am. Jur. 2d., Section 805 at 677-678. Because of the harshness of this common law rule, statutory enactments now regularly modify common law removing the need for unanimous consent by providing for appraisal and payment to dissenters. This is what Utah laws have done. But if the Defendants were successful in arguing they were bound by no statutory enactments, they would then fall back on this common law. Clearly, the Defendants have not complied with the common law.

V. A TRIAL COURT CANNOT RENDER A SUMMARY DECISION FINDING FORMS OF RELIEF TO BE "INEQUITABLE" WHEN THERE ARE MATERIAL, CONTESTED ISSUES OF FACT SET FORTH IN AFFIDAVITS BEFORE IT RELATING TO THAT FORM OF RELIEF.

The trial court's determination on this issue is set forth in its memorandum decision as follows:

The Court holds that first there can be no recession as there are many entities, people involved, that have so changed their position in reliance upon the transfer of assets that it would be inequitable for the Court to consider the remedies of recession and restitution.

T. R. at 552, Appendix Document J. This appears to be a factual determination, but no facts are recited which are found first to be undisputed and secondly applicable to this determination. The trial court's final order over Plaintiffs' objection provides no clarification. T. R. at 586, Appendix Document K.

This determination forecloses certain important remedies from later consideration. Interestingly, the Plaintiffs only asked for rescission in their fifth cause of action against unidentified Sam Soes 1-10 who took security positions against CVDA assets from IMPA. These persons are not even identified much less parties to the action as of the trial court's summary

decision.

Plaintiffs' first cause of action asks first for money damages and then alternatively for injunctive relief finding IMPA not to be the successor to CVDA and requiring possession and use of the CVDA assets and tradenames be returned to CVDA. Perhaps the trial court had reference to this alternative relief in making its ruling. However, a transfer of assets "void ab initio" does not require rescission or restitution remedies. The court is merely being asked to enforce the actual legal status between parties; that is, that IMPA has no rights in CVDA assets as it has acquired nothing.

The trial court's memorandum decision in its discussion of remedies should make a factual finding of inequity based upon undisputed facts. As is evident from the interchange of facts, the allegations of inequity or equity of pulling the cooperatives apart are squarely contested by Defendants and Plaintiffs. See Fact Statements 23-25, 28-32, Appendix Document L. This is simply not the type of area which a trial court can rule upon without full evidentiary hearing. This remedy has any number of possible permutations of how and or what parts could be divided or separated. The trial court's ruling is entirely premature. It lacks any full consideration of a wide range of alternatives. More critically it decides an issue which is factually disputed.

The trial court found that Plaintiffs "may have a cause of action for monetary damages by reason of the elimination of all of the assets of CVD which destroys the value of their equity

rights". T. R. at 552, Appendix Document J. The trial court found there are "no indications of a request for such damages in the complaint". Id. The court found instead that Plaintiffs relied upon "relief by reason of an invalid merger". Id.

Indeed Plaintiffs did allege an "invalid merger" and noncompliance with statutory prerequisites. However, it is the Defendants who labeled the combination a "merger". The term as generally used encompasses those other forms of combination. Furthermore, Plaintiffs did not complain solely of the "invalid merger" they also complained very specifically that "the assets and equity of CVD have been illegally transferred, mortgaged, sold, liened, assigned or otherwise seriously impaired". Verified Complaint, Paragraph 36. Further, that IMPA without right sold milk products of CVDA, used its trade names and usurped and appropriated the business. Id. at Paragraph 37. Further, that as a result the assets of CVD were diluted and dissipated by the Defendants. As a result Plaintiffs requested money damages of FIFTY FIVE MILLION DOLLARS (\$55,000,000.00). Id. at Paragraphs 38 and 39.

The trial court's discussion of forms of relief indicates error. The court could not in summary fashion on disputed facts exclude remedies. That decision was entirely premature for a court which will later be called to fashion a remedy as a court of equity. The court's statement that the complaint is limited to "merger" and does not ask for money damages is disproved by the verified complaint's own language.

The Defendants have created a moving target shifting names from "merger" to "consolidation" to "transfer of assets". It is they who have used these names interchangeably without any heed to technical significance. The Plaintiffs' complaint is that the combination by whatever name it is now called is not in accordance with legal requirements.

VI. THE TRIAL COURT ERRED IN FAILING TO ELUCIDATE THE LEGAL AND FACTUAL DECISIONS IT MADE BY ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW OR AT LEAST SPECIFYING THE BASIS FOR ITS RULING.

The Plaintiffs duly objected to the form of the order presented because it didn't follow the memorandum decision or elucidate factual or legal determinations. T. R. at 555.

The court made specific findings and conclusions which should be set out in a statement of findings of fact and conclusions of law pursuant to Rule 52(a), U.R.C.P., or at the very minimum, the memorandum decision should be incorporated in the order as the findings and conclusions.

Plaintiffs are entitled to instruction from the Court by what mechanism Plaintiffs complaint is dismissed, i.e., pursuant to Defendants' motion to dismiss or pursuant to Defendants' motion for summary judgment, or both.

In the court's memorandum decision, it specifically holds that the class action is not appropriate because equity holders, producers and directors "may have different interests" and goes on to state that the class action is inappropriate "for other reasons that will be better understood as set forth in the body of this memorandum decision". The decision then fails to later

clarify. Pursuant to Rule 23, U.R.C.P., the order should include the specific reasons for the inappropriateness of the class action so that Plaintiffs could propose alternative representatives and/or particular issues for particular class action causes or propose that the class be divided into subclasses, all pursuant to Rule 23(c)(4)(A)(B), U.R.C.P.

Finally, the court, in its memorandum decision, holds that a merger or consolidation is "not an exclusive alternative to a change or affecting the consolidation by its change of assets" but fails to conclude what other alternatives are available and pursuant to what authority.

Since the court's memorandum decision is a final order affecting the complete summary disposition of the action, Plaintiffs are entitled to clear and specific findings and conclusions stating the courts basis and reasons for its action. This is also required for the necessary appeal process. The trial court erred in this failure specifically with respect to the request for class certification.

CONCLUSION

The Plaintiffs have argued first that Defendants must follow as a statutory exclusive for combination, Section 3-1-30 et seq. As a first backup argument, Plaintiffs argue that Defendants are bound by their own notice and the only authorization ever obtained from the CVDA Board which was to complete a "merger". As a second backup argument, Plaintiffs have argued that if Defendants are not bound by Section 3-1-30 et seq. or their own

acts, they must follow corporate law respecting a "consolidation" or "transfer of assets". As yet a third backup argument, Defendants must follow common laws.

Defendants' acts fail each of these standards whether it be a "merger", "consolidation" or "transfer of assets". Defendants have no authority for their activities by whatever name they use. The trial court mischaracterizes Plaintiffs' complaint as being based solely upon a failure to follow the statutory merger procedure when Plaintiffs allege violation under each alternative by alleging the transfer of assets was illegal and unauthorized.

The Plaintiffs' request relief from this Court as follows:

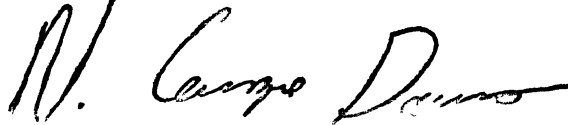
1. A determination that any combination of agricultural cooperatives must be completed in accordance with the statutory procedures of Section 3-1-30 et seq.
2. Alternatively, that the activities of Defendants and the approval of the CVDA Board require a statutory merger pursuant to Section 3-1-30 et seq.
3. Alternatively, that any combination of agricultural cooperatives must follow the statutory procedures of Section 3-1-30 et seq. or the general corporate procedures set forth for business or non-profit corporations by statute.
4. Alternatively, that the Defendants must follow the common law requirement of unanimous consent of stockholders.
5. A reversal of the trial court's decision relative to

forms of relief it being based on disputed facts and premature for a court of equity.

6. Prospective direction to the trial court to proceed with a proper determination of class certification and to make appropriate findings and conclusions in that and all other regards.

DATED this 19 day of March, 1988.

DAINES & KANE



N. George Daines
Attorney for Appellants



Kevin E. Kane
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of March, 1988, I served four (4) true and correct copies of the foregoing BRIEF OF APPELLANTS and APPENDIX TO BRIEF OF APPELLANTS by hand delivering the same to the following:

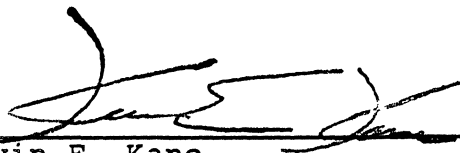
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